

143 FERC ¶ 61,114  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Midwest Independent Transmission  
System Operator, Inc.

Docket No. ER13-1074-000

ORDER ACCEPTING NOTICE OF TERMINATION

(Issued May 10, 2013)

1. In this order, we accept Midwest Independent Transmission System Operator, Inc.'s (MISO's) notice of termination of the Generator Interconnection Agreement (GIA) among Otter Tail Power Company (Otter Tail) as Transmission Owner, Ellerth Wind LLC (Ellerth) as Interconnection Customer, and MISO as Transmission Provider (collectively, Parties),<sup>1</sup> to be effective May 11, 2013, as requested.

**I. Notice of Termination**

2. MISO's proposed notice of termination pertains to the GIA for the Ellerth Wind Project (Project), designated as Project G968 in MISO's interconnection queue. The GIA provides the Project with up to 98.9 MW of Energy Resource Interconnection Service, and 19.8 MW of Network Resource Interconnection Service, with a point of interconnection at a new switching station (Switching Station) to be constructed along Otter Tail's Karlstad – Viking 115 kV transmission line near Newfolden, Minnesota.

3. MISO makes two arguments in support of its notice of termination. First, MISO maintains that Ellerth is in breach and default under the GIA for failing to meet required milestones that are material terms of the GIA.<sup>2</sup> MISO states that it has provided to

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<sup>1</sup> The Parties executed the GIA on January 18, 2011. MISO designated the Agreement as Original Service Agreement No. 2300 under its FERC Electric Tariff, Fourth Revised Vol. No. 1 (Tariff) and reported it in its Electric Quarterly Report.

<sup>2</sup> MISO Notice of Termination at 2. Among other things, Appendix B of the GIA requires Ellerth to make progress payments to Otter Tail by specified deadlines.

Ellerth a notice of breach, notice of default, and notice of termination in accordance with the terms of the GIA.<sup>3</sup> MISO states that, to its knowledge, Ellerth has neither taken steps to cure the breach or the default that MISO alleges to have occurred, nor placed any disputed amount in escrow as required by the GIA.

4. Second, MISO argues that termination of the GIA is just and reasonable, is not unduly discriminatory, and is consistent with the public interest<sup>4</sup> and Commission precedent.<sup>5</sup> MISO notes that, in ruling on a proposed notice of termination in *Lakeswind I*, the Commission stated:

Commission precedent supports acceptance of a notice of termination if the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory or preferential, or if it is consistent with the public interest. When considering whether to extend milestones or to grant or extend a suspension the Commission takes into account many factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue.<sup>6</sup>

5. MISO argues that acceptance of its notice of termination meets this standard because acceptance will eliminate the harm to lower-queued projects, to projects in the same group study, to the transmission owners, and to the MISO interconnection queue

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<sup>3</sup> MISO Notice of Termination at 4. MISO cites the following GIA provisions as support for terminating the agreement: (1) Articles 2.3.2 and 2.3.3 (providing that any non-breaching party may terminate the GIA upon the default of a breaching party); (2) definition of “default,” i.e., failure of a breaching party to cure its breach in accordance with Article 17; and (3) Article 17.1.1 (providing that the failure of a breaching party to cure a breach within 30 calendar days of receiving such notice shall result in a default, provided that the interconnection customer shall have up to 90 calendar days to cure the breach where such breach is not capable of cure within 30 days).

<sup>4</sup> MISO Notice of Termination at 4.

<sup>5</sup> MISO bases its argument on *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,008 (2011) (*Lakeswind I*), order on reh’g and clarification, 141 FERC ¶ 61,097 (2012) (*Lakeswind II*).

<sup>6</sup> MISO Notice of Termination at 4-5 (quoting *Lakeswind I*, 137 FERC ¶ 61,008 at P 25 (citations omitted)).

process that the Project will cause if it remains in the queue.<sup>7</sup> It adds that acceptance will benefit other projects by removing uncertainty regarding whether the upgrades in question will be built.

6. MISO further asserts that the Commission clarified in *Lakeswind II* that key factors in its determination not to accept that notice of termination were: (1) whether any other projects were relying on network upgrades that the interconnection customer was to build; and (2) the interconnection customer's good faith efforts to cure its default, including payment of security sufficient for the transmission owner. MISO maintains that Ellerth's default has not been cured, and MISO cannot permit Ellerth to avoid its obligations or alter its milestones until the current default is cured.<sup>8</sup>

7. MISO also states that neither suspension of the GIA nor extension of its milestones is a permissible option.<sup>9</sup> It maintains that the MISO Tariff no longer provides for the suspension of obligations under a GIA unless a defined "Force Majeure" event occurs, and no such event has occurred in this case. MISO states that, because obligations may not be suspended absent a Force Majeure event, MISO cannot extend milestones until Ellerth first meets its obligations and cures the default.

## **II. Notice of Filing and Responsive Pleadings**

8. Notice of MISO's filing was published in the *Federal Register*, 78 Fed. Reg. 17,195 (2013), with interventions and protests due on or before April 2, 2013. On March 25, 2013, Otter Tail filed a timely motion to intervene. On April 2, 2013, Ellerth filed a timely motion to intervene and protest, and MISO Transmission Owners<sup>10</sup> filed a

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<sup>7</sup> MISO Notice of Termination at 5.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*

<sup>10</sup> MISO Transmission Owners consist of: Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Indiana, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation; Northwestern Wisconsin Electric Company; Otter

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timely motion to intervene and comments. On April 17, 2013, MISO filed an answer to Ellerth's protest. On April 25, 2013, Ellerth filed a motion for leave to answer and answer.

9. In its protest, Ellerth states that the notice of termination should be found unjust, unreasonable, and not in the public interest because MISO has not made a showing of actual harm that will be prevented if the notice is accepted.<sup>11</sup> Further, Ellerth requests that the Commission direct MISO to amend the milestones under the GIA. Ellerth asserts that MISO has refused to participate in discussions regarding amendment to the GIA on many occasions since before a breach by Ellerth, and that MISO's refusal to work with Ellerth has led to the default that forms the basis of MISO's notice of termination.<sup>12</sup>

10. Ellerth argues that MISO should be required to demonstrate specific harm to lower queued interconnection customers.<sup>13</sup> Ellerth sees no merit in MISO's claims that the complexities of its interconnection studies prevent MISO from being able to precisely identify harm where it actually occurs, and that MISO has failed in previous attempts to establish a generic rule that extensions to interconnection milestones harm customers by uncertainty and delay.<sup>14</sup> Ellerth argues that acceptance of MISO's notice of termination here would be tantamount to a generic finding applicable to all future interconnection agreements that a default equals termination, notwithstanding Commission precedent or any factual analysis.<sup>15</sup>

11. More specifically, Ellerth asserts that MISO has not demonstrated that there would be a shift in network upgrade costs due to the Project remaining in the queue.<sup>16</sup> Ellerth states that the Switching Station is the only network upgrade that the Project requires under the GIA. Because no other customer shares in the Switching Station's costs or relies on its construction for its own interconnection service, Ellerth claims that there is

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Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

<sup>11</sup> Ellerth Protest at 1.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 8-9.

<sup>16</sup> *Id.* at 10.

no potential cost shift. Furthermore, Ellerth states that MISO has failed to identify any customer whose upgrades may need to be restudied if the Project does not go forward.<sup>17</sup>

12. Ellerth also rebuts MISO's argument that Ellerth's default means that the Project is *ipso facto* speculative.<sup>18</sup> Specifically, Ellerth claims that MISO's argument lacks material precision, risks oversimplifying the realities of developing power generation facilities, and overlooks Ellerth's efforts to develop the Project. As to the final point, Ellerth explains that, within two months of executing the GIA, Ellerth demonstrated continued site control to MISO's satisfaction, Ellerth worked with the Minnesota Public Utility Commission on applying for a certification of need and a site permit, and Ellerth invested considerable time and effort to negotiate with Minnkota Power Cooperative for a transmission wheel to mainland MISO.<sup>19</sup> Ellerth states that it has also competed in numerous power purchase agreement and build-transfer solicitations and bilateral negotiations during the last two and half years, and has completed 100 percent site control for the Project. Ellerth states that it has invested \$1,000,000 in developing the Project, showing that the Project is not speculative in nature.<sup>20</sup>

13. Ellerth claims that, despite its continued efforts, a late-2012 Commercial Operation Date became "out of reach," and it made a good faith effort to avoid the breach by amending the Switching Station's in-service date and the Project's Commercial Operation Date to a timeframe that would be agreeable to the parties.<sup>21</sup> Ellerth claims that a reasonable response from MISO would have been to renegotiate Ellerth's milestones. Ellerth requests that the Commission clarify for MISO that amending milestones is not equivalent to a suspension, and direct MISO to amend the milestones under the GIA.<sup>22</sup>

14. MISO Transmission Owners maintain that termination is justified because of the uncertainty caused by Ellerth's breach and the potential harm to lower-queued projects that could arise if Ellerth terminates the GIA at a later date.<sup>23</sup> MISO Transmission

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> *Id.* at 13-14.

<sup>23</sup> MISO Transmission Owners Comments at 7.

Owners maintain that the potential adverse effect of cascading restudies also supports termination.<sup>24</sup> They state that MISO and affected transmission owners should be protected from having to expend resources for speculative projects, and that lower-queued interconnection customers are entitled to greater certainty. MISO Transmission Owners state that it is detrimental to the market if a party to an agreement can escape the consequences of its breach.<sup>25</sup> Finally, MISO Transmission Owners argue that the proposed termination is consistent with the position on termination that the Commission took in *Lakeswind I* and *Lakeswind II*.<sup>26</sup>

15. In its answer, MISO maintains that it is not required to show a more specific harm to permit the notice of termination to go into effect.<sup>27</sup> MISO states the *Lakeswind I* standard does not require such a showing, but rather requires termination be: (1) not unjust, unreasonable, unduly discriminatory, or preferential; or (2) consistent with the public interest. MISO asserts that, although the Commission may consider harm in deciding whether to extend suspension or milestones, a specific showing of harm to a specific project is not necessary under the *Lakeswind I* standard.

16. MISO reiterates that the MISO Tariff does not permit the suspension of the GIA discussed in *Lakeswind I*, as the MISO Tariff no longer provides for suspension of obligations under a GIA unless a defined “Force Majeure” event occurs.<sup>28</sup> MISO notes that Section 4.4.4 of its Generator Interconnection Procedures (GIP) provides that a change to the In-Service Date or the Commercial Operation Date of a project in the Definitive Planning Phase is an impermissible Material Modification, but that MISO should not unreasonably withhold approval to an Interconnection Customer’s proposed change to these dates where the requested change is the result of: (1) a change in milestones by another party to the GIA; or (2) a change in a higher-queued Interconnection Request, provided that, in either case, these changes do not exceed three years beyond the original Commercial Operation Date or In-Service Date. MISO states that Ellerth’s request to extend the milestones before the date of its breach does not change the facts of the case, as MISO’s Tariff’s limit of a three-year extension of the Commercial Operation Date would be exceeded by Ellerth’s request of an indefinite extension, and MISO’s Tariff does not permit a Material Modification because of the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.*

<sup>27</sup> MISO Answer at 4.

<sup>28</sup> *Id.* at 5-6.

Project's lack of a power purchase agreement or other ongoing economic issues that may prevent or slow development.<sup>29</sup>

17. As to Ellerth's claims that MISO has not demonstrated harm to another customer, MISO asserts that it need not justify termination of a GIA with a specific harm, and that its studies are intended to determine needed upgrades rather than establishing specific harm to others if the project does not proceed.<sup>30</sup>

18. MISO also asserts that *Lakeswind I* is distinguishable in that Ellerth has not made any appropriate effort to cure its default beyond seeking an impermissible extension of indeterminate duration.<sup>31</sup> Further, MISO states that Ellerth has not provided sufficient security to the transmission owner. MISO maintains that acceptance of Ellerth's request to be absolved from the consequences of its default could be viewed as a generic finding that interconnection agreement terms will not be enforceable unless there is a direct harm to another interconnection project.<sup>32</sup> MISO also states that the appropriate measure of whether a project with a GIA is "speculative" must consider whether a project is currently meeting its obligations regardless of past investment.<sup>33</sup>

19. MISO further maintains that Ellerth's request to amend the GIA is impractical because Ellerth has not provided a Commercial Operation Date or time period by which the milestones may be met.<sup>34</sup> MISO insists that investment and negotiations alone are not sufficient to deem a project viable. Accordingly, MISO requests that the Commission accept the notice of termination, and notes that Ellerth may submit a new interconnection request and re-enter the queue at any time under MISO's new GIP.<sup>35</sup>

20. In its answer, Ellerth argues that MISO proposes to satisfy the standard for termination based on the "documented harm" that defaulted projects *can* cause to the interconnection queue, but that there is a substantial difference between showing that a category of customers *can* cause harm and showing that a specific customer *actually*

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<sup>29</sup> *Id.* at 6 and 7.

<sup>30</sup> *Id.* at 9-10.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 15-16.

causes harm to others. That distinction, states Ellerth, has not been lost on the Commission, as even in the wake of queue reform and the acknowledgment that defaulted projects *can* cause harm, the Commission has continued to require that MISO present “specific evidence” in support of a termination.<sup>36</sup>

### III. Discussion

#### A. Procedural Matters

21. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by MISO and Ellerth because they have provided information that has assisted us in our decision-making process.

#### B. Substantive Matters

23. Commission precedent supports acceptance of a notice of termination if the applicant demonstrates that the proposed termination is not unjust, unreasonable, unduly discriminatory, or preferential,<sup>37</sup> or if it is consistent with the public interest.<sup>38</sup> When considering whether to extend milestones or to grant or extend a suspension, the Commission takes into account many factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue.<sup>39</sup>

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<sup>36</sup> Ellerth Answer at 4 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,171 (2013) (*Jeffers South*)).

<sup>37</sup> See, e.g., *Allegheny Power System, Inc.*, 102 FERC ¶ 61,318, at P 9 (2003).

<sup>38</sup> See, e.g., *Duke Energy Moss Landing LLC, et al.*, 83 FERC ¶ 61,318, at 62,306 (1998), *order on reh’g*, 86 FERC ¶ 61,227 (1999).

<sup>39</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,124 (2010) (no showing that extending commercial operation date will harm lower-queued interconnection customers); *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,172 (2010) (proposed revision to commercial operation date will not disadvantage lower-queued interconnection request or interconnection customer); *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007) (finding lower-queued generator will not be harmed by

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24. In the instant case, we find that Ellerth failed to meet a required milestone under the GIA.<sup>40</sup> MISO followed the procedures in its tariff by submitting to Ellerth a notice of breach, a notice of default, and a notice of termination. Under Article 17.1.1 of the GIA, the failure of the breaching party to cure a breach within 30 calendar days of receiving a notice of breach shall result in a default, but the interconnection customer shall have up to 90 calendar days to cure the breach where such breach cannot be cured in the 30-day period. We do not find evidence in the pleadings before us that Ellerth cured the breach at issue. The facts in this case differ from the facts in *Lakeswind I*, where the interconnection customer showed good faith efforts to cure its breach and paid security that was sufficient to the transmission owner.<sup>41</sup>

25. As to Ellerth's claim that MISO refused to work with Ellerth on adjustment of milestones, we find that MISO followed the appropriate provisions of its tariff. As Ellerth itself recognizes,<sup>42</sup> MISO had no obligation under the terms of the GIA to renegotiate Ellerth's milestones. The Commission has stated that an interconnection customer that fails to meet its requirements may be in breach and subject to the termination provisions of the GIA.<sup>43</sup>

26. As both parties recognize, the Commission, in considering whether to extend milestones or to grant or extend a suspension, takes into account certain factors, including whether the extension would harm generators lower in the interconnection queue and any uncertainty that speculative projects may present to other projects in the queue. First, we agree with MISO that suspension is not an option in the instant case, as the MISO Tariff provides that suspension may only occur based on a Force Majeure event.<sup>44</sup> Ellerth does

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additional suspension period and that interconnection customer actively seeks to continue progress).

<sup>40</sup> We note that MISO provides specific details in support of its argument in an exhibit to its notice of termination that it has designated as privileged. However, Ellerth provides information on MISO's allegations in its protest. We find that this information, along with the other public filings in the proceeding, is sufficient to allow us to rule on MISO's proposal without recourse to any material that has been designated privileged.

<sup>41</sup> *Lakeswind I*, 137 FERC ¶ 61,008 at P 24.

<sup>42</sup> Ellerth Protest at 15.

<sup>43</sup> *Lakeswind II*, 141 FERC ¶ 61,097 at P 41.

<sup>44</sup> Section 5.16.1 of the GIP provides that the interconnection customer will not suspend unless a Force Majeure event occurs.

not argue any such event has occurred. Second, as to adjustment of milestones, we find no record support that a new viable Commercial Operation Date was proposed or that Ellerth would qualify to change its Commercial Operation Date or In-Service Date even if a viable Commercial Operation Date had been proposed, as the GIP only allows changes in the Commercial Operation Date or In-Service Date of a GIA under narrow circumstances which are not present here.<sup>45</sup>

27. Under the particular facts of this case, we find that the extension of milestones, without further evidence of an intent to cure, may present harm to lower queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated if the project is removed from the queue at a later date. While Ellerth argues that there is no potential cost shift in this case because the Switching Station is the only network upgrade required for the interconnection and no other customer is relying on its construction for its own interconnection service, the potential still exists for future reliance on this network upgrade by lower queued interconnection customers, and resultant harm. Furthermore, despite Ellerth's attempt to apply *Lakeswind I* in support of its request that the Commission require MISO to amend the milestones in the GIA, there is a key distinguishing factor between the cases: *Lakeswind* requested that its milestones be amended to reflect its revised cost responsibility, while Ellerth is seeking an extension of time to make its progress payments. An interconnection customer's difficulties in securing funding do not exempt it from meeting the obligations that it agreed to when it executed the GIA. As to Ellerth's reliance on *Jeffers South*, we delayed ruling on MISO's proposed termination of Jeffers South LLC pending the resolution of matters before the Commission in a hearing in Docket No. EL10-86.<sup>46</sup> That is not the case here.

28. Accordingly, based on the particular circumstances presented in this case, we find that the notice of termination is not unjust, unreasonable, unduly discriminatory or preferential, and we will therefore accept MISO's filing.

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<sup>45</sup> Section 4.4.4 of the GIP provides that the transmission provider will not unreasonably withhold approval of an interconnection customer's proposed change to the Commercial Operation Date if that change is the result of (a) a change in milestones of another party to the GIA or (b) a change in a higher queued interconnection request, provided in either case these changes do not exceed 3 years beyond the original Commercial Operation Date.

<sup>46</sup> *Jeffers South*, 142 FERC ¶ 61,171 at P 30.

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The Commission orders:

MISO's notice of termination is hereby accepted, effective May 11, 2013, as discussed in the body of this order.

By the Commission.

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Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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